Supreme Court, U.S.
FILED
APR 11 1995
OFFICE OF THE CLERK

(11)

No. 94-1437

IN THE

Supreme Court of the United States

October Term, 1994

CONOPCO, INC. D/B/A CHESEBROUGH POND'S USA CO.

Petitioner,

v.

THE MAY DEPARTMENT STORES COMPANY, VENTURE STORES, INC., THE BENJAMIN ANSEHL COMPANY, AND KESSLER CONTAINERS, LTD.

Respondents.

OPPOSITION OF THE MAY DEPARTMENT STORES COMPANY AND VENTURE STORES, INC. TO MOTIONS OF AMICI TO FILE BRIEFS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PAUL F. KILMER*
THOMAS W. BROOKE
GADSBY & HANNAH
1747 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 429-9600
Attorneys for Respondents The May Department Stores Company and Venture Stores, Inc.

**Counsel of Record*

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

BEST AVAILABLE COPY

25 pp

TABLE OF AUTHORITIES

CASES	PAGE
Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033 (2d Cir. 1992)	8
Demarest v. Manspeaker, 498 U.S. 184 (1991) . .	6
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) . . .	6
Dixi-Cola Laboratories, Inc. v. Coca-Cola Co. 117 F.2d 352 (4th Cir.), *cert. denied*, 314 U.S. 629 (1941)	7
Henry Heide, Inc. v. George Ziegler Co., 354 F.2d 574 (7th Cir. 1965)	7
Norwich Pharmaceutical Co. v. Sterling Drug, Inc. 271 F.2d 569 (2d Cir. 1959)	7
Oral-B Labs., Inc. v. Mi-Lor Corp., 810 F.2d 20 (2d Cir. 1987)	1,7,8
Payless Shoesource, Inc. v. Reebok Intern. Ltd., 998 F.2d 985 (Fed. Cir. 1993).	10
Qualitex Co. v. Jacobson Products Co., __ U.S. __, 63 U.S.L.W. 4227 (U.S. March 28, 1995) . .	8
Tone Bros. v. Sysco Corp., 28 F.3d 1192, (Fed. Cir. 1994)	10
Two Pesos, Inc. v. Taco Cabana, Inc., __ U.S. __, 112 S.Ct. 2753, 120 L.Ed.2d 615, *reh'g denied*, __ U.S. __, 113 S.Ct. 20, 120 L.Ed.2d 947 (1992)	9
PUBLICATIONS	
P. Fitzell, *Private Label Marketing in the 1990s* (Global Book Productions, New York, N.Y., 1992)	6

ABBREVIATIONS APPEARING IN THIS BRIEF

AHP Br.	Brief *Amicus Curiae* of American Home Products Corporation and Nabisco, Inc. in Support of Petitioner
AHP Mot.	Motion of American Home Products Corporation and Nabisco, Inc. for Leave to File Brief *Amicus Curiae* in Support of Petitioner
Ansehl	The Benjamin Ansehl Company, a Respondent in this matter, a Defendant in the original action
Ansehl Br.	Brief in Opposition to Petition for Writ of Certiorari of Respondents The Benjamin Ansehl Company and Kessler Containers, Ltd.
Bristol-Myers Br.	Brief of the Bristol-Myers Squibb Company as *Amicus Curiae* in Support of The Petition
Chesebrough	Conopco, Inc. doing business as Chesebrough Pond's USA Co., Petitioner in this matter, Plaintiff in the original action
Gerstman Br.	Brief of Gerstman + Meyers Inc. and Wallace Church Associates, Inc. as *Amicus Curiae* in Support of Petitioner
INTA Br.	Brief *Amicus Curiae* of the International Trademark Association in Support of Petition
INTA Mot.	Motion of the International Trademark Association for Leave to File Brie *Amicus Curiae* in Support of Petition

May	May Department Stores Company, a Respondent in this matter, a Defendant in the original action
Pet.	The Petition for Certiorari filed by Conopco, Inc.
Pet. App.	Appendix to the Petition for Certiorari filed by Conopco, Inc.
SmithKline Br.	Brief of SmithKline Beecham *Amicus Curiae* in Support of Petitioner
SmithKline Mot.	Motion of SmithKline Beecham for Leave to File Brief *Amicus Curiae* in Support of Petitioner
Target	Target Stores, a division of Dayton Hudson Corporation; neither Target Stores nor Dayton Hudson is a party to this action
VICL	Vaseline Intensive Care Lotion
Venture	Venture Stores, Inc., a Respondent in this matter, a Defendant in the original action
Venture Amendment	Amendment to Brief of The May Department Stores Company and Venture Stores, Inc. in Opposition to Petition for Writ of Certiorari
Venture Br.	Brief of The May Department Stores Company and Venture Stores, Inc. in Opposition to Petition for Writ of Certiorari
Venture Br. App.	Appendix to Brief of The May Department Stores Company and Venture Stores, Inc. in Opposition to Petition for Writ of Certiorari

No. 94-1437

IN THE

Supreme Court of the United States

October Term, 1994

CONOPCO, INC. D/B/A CHESEBROUGH POND'S USA CO.

Petitioner,

v.

THE MAY DEPARTMENT STORES COMPANY, VENTURE STORES, INC., THE BENJAMIN ANSEHL COMPANY, AND KESSLER CONTAINERS, LTD.

Respondents.

OPPOSITION OF THE MAY DEPARTMENT STORES COMPANY AND VENTURE STORES, INC. TO MOTIONS OF AMICI TO FILE BRIEFS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Venture and May hereby oppose the motions of the Amici to file briefs in support of the Petition for Writ of Certiorari.

The assertions raised by the Amici fall into the following categories:

1. The Federal Circuit's decision is based solely upon the presence of the Venture logo on its product. See, INTA Mot. 2, Br. 5 and 8 - 9; AHP Mot. 2, Br. 5-7; and Bristol-Myers Br. 2-8.

2. The confusion evidence should have been ascribed greater significance. INTA Br. 10-11; AHP Br. 8-13; and Bristol-Myers Br. 10-15.

3. A likelihood of confusion should have been inferred from intentional copying by the private labellers. Gerstman Br. 2-3 and 4-5.

4. The Federal Circuit gave a lesser degree of protection to trade dress than to other forms of trademarks and improperly created a "private label exception" to traditional trademark law. See, INTA Mot. 2, Br. 2-8; Gerstman Br. 3-4, 6-7; AHP Br. 3-8; and SmithKline Mot. 2-3, Br. 4-5.[1]

These assertions will be addressed in order.

1. No Single Factor Influenced the Decision of the Federal Circuit

The Federal Circuit here recognized five (5) factors which necessitated reversal:

a. The prominent presence of Venture's logo on the allegedly infringing product. Pet. App. 16a, 23a and Ansehl Br. 12-13, including n.8.

b. The prominent presence of Venture's logo on signs, advertisements, promotions, and other private label products sold by Venture combined with a large volume of annual sales ($1.3 billion; Pet. App. 17a), such that consumers recognize the Venture logo and identify it with Venture as the source of the private label products. Pet. App. 16a-17a and Ansehl Br. 4.

c. The ten (10) year history of inaction by Chesebrough while Venture used trade dress parallel to that of VICL (e.g. a yellow bottle with a green and blue label, sometimes with a yellow label panel) bearing

---

[1] Other arguments of the Amici are not addressed since they impermissibly overlap those made by Chesebrough. For example, the Gerstman and Bristol-Myers Briefs repeat Chesebrough's arguments regarding the alleged conflict between the Circuits arising from the decision in *Oral-B Labs., Inc. v. Mi-Lor Corp.*, 810 F.2d 20 (2d Cir. 1987) This argument has been addressed in Venture's Brief in Opposition. Venture Br. 11-13; *see*, Ansehl Br. 8-10.

the Venture logo - - which from at least 1982 until 1991 was placed on the Venture skin care lotion *without* the Venture name. Pet. App. 17a, 23a. *See*, Venture Br. App. G4-G6 and Ansehl Br. 5-6, including n.5. Further, Chesebrough notes in its Petition that there was a period of more than twenty (20) years during which the private label industry used trade dress similar to VICL. Pet. 4-5; *see* Venture Br. App. C.

d. The absence of actual confusion between the Chesebrough and Venture products for more that ten (10) years. Pet. App. 17a, 23a; *see* Ansehl Br. 12-13, including n.9.

e. The fact that the one instance of reported confusion, involving a TARGET private label product, not a Venture private label product, based on a erroneous belief of the consumer (*not* confusion), was "atypical", "isolated" and unsupported by any other direct or survey evidence of actual confusion. Pet. App. 12a, including n. 9. The dissent goes so far as to characterize the testimony of the confusion witness as "idiosyncratic and mistaken". Pet. App. 30a, n.3. The relevance of the sole alleged instance of confusion was further placed in doubt due to the fact that Chesebrough printed an "800" toll-free number on the back of nearly *100 million* bottles of VICL sold prior to institution of this action and *no* confusion was reported to Chesebrough. Ansehl Br. 6.

The failure of the Amici to recognize the ***multiple*** clear errors of commission and omission detected by the Federal Circuit in the findings of the trial court underscores the essential weakness in all the Amici briefs: they wish that this case either included or lacked certain elements which would make it more agreeable to their arguments.

However, the decision of the Federal Circuit must be viewed as a whole and on its own merits, not based upon the wishful thinking of the Amici. On its own merits, the Federal Circuit's determination was multi-faceted and did not rest solely upon the presence of Venture's logo on the private label product at issue.

All of this having been said, the presence of Venture's logo on its private label products was an important element of the analysis of the Federal Circuit, and properly so. Pet. App. 16a-23a; Venture Br. App. A, C and G; Venture Amendment 1; and Ansehl Br. 4-6 and 12-13.

2. The Federal Circuit Properly Evaluated the "Confusion" Evidence

The INTA Brief starts from the false premise that the alleged confusion witness "purchased the respondent's product." INTA Br. 10. The witness actually purchased a TARGET private label product. Venture had nothing to do with the Target product, yet Chesebrough decided to pursue Venture in this matter rather than Target. Pet. App. 8, n.4.

The Amici also wish to overlook the fact that the testimony of the alleged confusion witness was soundly rejected by both the majority ***and*** the ***dissent*** of the Federal Circuit panel. Pet. App. 11a-15a and 30a, n. 3.

INTA argues that the testimony of the "confusion" witness was improperly rejected since the witness was actually correct in her assumption that private label products are made by national brand companies. INTA Br. 10. Chesebrough and INTA point to various sources which indicate that "many national brand manufacturers have followed the practice of manufacturing private label versions of their own products." INTA Br. 10 and Pet. 16 including n.12.

It is true that for many years Chesebrough supplied yellow bottles to Ansehl and others in which private label skin care

lotion was sold with labelling including the blue and green colors originated, *but not protected*, by Chesebrough for VICL. Appendix A hereto; Pet. App. 33a; Ansehl Br. 4-5; *see e.g.* Venture Br. App. C. But this fact does not help Chesebrough or the Amici.

The argument of INTA is incorrect and misguided for at least two reasons. First, the Federal Circuit correctly indicated that there was nothing in the record ***of this case*** which supported the finding of confusion by the witness. Pet. App. 11a[2] and Ansehl Br. 6. Chesebrough did not choose to rely upon evidence that national brand companies produce private label products. The Federal Circuit, unlike INTA and Chesebrough, relied upon the record created before the trial court - - not press clippings, books and excerpts from the facts adduced in other cases found after the trial.

Second, there was a good reason at trial that Chesebrough did not wish to ascribe significance to the fact that national brand manufacturers supply products to the private label industry. Dwelling on that issue would have placed tremendous emphasis on the fact that Chesebrough supplied to Ansehl and others yellow bottles in which Venture and other private label skin care lotions were sold bearing labels such as those shown in Appendix C to Venture's Brief in Opposition. Appendix A hereto; Pet. App. 33a; Ansehl Br. 4-5; *see* Venture Br. App. C. This history, virtually standing alone, would have raised serious issues of laches and acquiescence which were recognized by the Federal Circuit (Pet. App. 17a and 23a) but ignored by the trial court.[3]

---

[2] "The problem with the testimony is that Mrs. Sickles' confusion arose at least in part from her assumption, erroneous as applied to this case, that national brand manufacturers secretly market private label brands. First, there is **no evidence** that this assumption is widely held by the relevant consumers, the vantage point from which the confusion issue must ultimately be addressed." (Emphasis added) Pet. App. 11a.

[3] *See also* Pet. 4-5, describing Chesebrough's inaction and complicity during the growth of the private label skin care lotion industry.

The effort by INTA and Chesebrough to introduce new evidence into the record is not a proper basis for granting certiorari. *Demarest v. Manspeaker*, 498 U.S. 184, 189, 111 S.Ct. 599, 603 (1991); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195, n.2, 109 S.Ct. 998, n.2 (1989). The fact that Chesebrough and some or all of the Amici engaged in the practice of supplying products to private labellers merely points out the complicity of the Amici in the growth of the private label industry - - a genie they are now trying to put back in a bottle from which ***they*** released it. *see* Pet. 16, n.12, citing P. Fitzell, *Private Label Marketing In the 1990's* (Global Book Productions, New York, N.Y., 1992) (Mr. Fitzell notes that amicus **Nabisco** is a prominent source of private label products. *Private Label Marketing* at 75).

The Amici also assert that the Federal Circuit failed to recognize forms of trademark confusion other than direct confusion (i.e the consumer mistakes the product of the alleged infringer for that of the trademark owner). *see* Bristol-Myers Br. 10-15. These Amici point out that courts have recognized other types of confusion, such as confusion as to "sponsorship" or "association". Bristol-Myers Br. 10-15. The Amici overlook the fact that the Federal Circuit here specifically noted "the findings made by the [trial] court do not support a conclusion that consumers ***associate*** the Venture brand with Conopco, rather than with Venture." (Emphasis added). Pet. App. 23a. Thus the Federal Circuit specifically addressed the alternative forms of possible "confusion" relied upon by the Amici.

As noted above, the evidence of the "confusion" witness was rejected, in part, due to lack of support in the record for her assumption that "national brand manufacturers secretly market private label brands." Pet. App. 11a. Therefore the Federal Circuit also considered and rejected as clearly erroneous the "association" made by the confusion witness.

The unsupported, de minimis and isolated nature of the testimony of one witness regarding actual confusion and the failure by Chesebrough to identify any other instances of alleged confusion have been addressed under point 1, above. Thus the "confusion" issue was properly addressed in all of its facets by the Federal Circuit.

3. A Presumption of Actual Confusion or Likelihood of Confusion Was Inappropriate Here

Several of the Amici assert that the Federal Circuit should have applied a presumption of either actual confusion or a likelihood of confusion in this case since the Respondents were found to have intentionally imitated certain elements of the trade dress of VICL. *See* Gerstman Br. 2-5. This ignores the significance of the trial court's erroneous finding of actual confusion (Pet. App. 11a-12a and 30a, n. 3), the absence of any evidence of confusion between the Venture and Chesebrough products for more than ten (10) years (Pet. App. 17a), and the considerable history of private label versions of VICL noted by the Federal Circuit (Pet. App. 17a and 23a) and Chesebrough in its Petition (Pet. 4-5) which diminished the trademark significance of Chesebrough's asserted trade dress. *See Henry Heide, Inc. v. George Ziegler Co.*, 354 F.2d 574, 576 (7th Cir. 1965); *Norwich Pharmaceutical Co. v. Sterling Drug, Inc.*, 271 F.2d 569, 573 (2d Cir. 1959); *Dixi-Cola Laboratories, Inc. v. Coca-Cola Co.*, 117 F.2d 352, 358 (4th Cir.), *cert. denied*, 314 U.S. 629 (1941).

In all other respects the Federal Circuit has ably answered the question of why a presumption of likelihood of confusion is inappropriate under the facts of this case and under the precedents of the Eighth Circuit and other Circuits. Pet. App. 12a-15a and 17a-22a[4] ; *See* Ansehl Br. 12-14.

---

[4] The Gerstman Brief also alleges that the Second Circuit in *Oral-B Labs., Inc. v. Mi-Lor Corp.*, 810 F.2d 20 (2d Cir. 1978) recognized that "intentional copying creates a presumption of likelihood of confusion".

Finally, the suggestion in the Gerstman Brief that the Federal Circuit's decision is somehow contrary to this Court's recent decision in *Qualitex Co. v. Jacobson Products Co.*, __ U.S. __, 63 U.S.L.W. 4227 (U.S. March 28, 1995) is not well founded. Gerstman Br. 1 and 4. *Qualitex* involved the issue of whether a single color, uniformly applied to a product (i.e. dry cleaning pads) could be protected as a trademark where there was evidence that the trademark owner had been the sole source of the products sold in that color for almost 40 years and the alleged infringer began its use of a similar single color for the same goods shortly before the civil action was filed. *Id.*, 63 U.S.L.W. at 4227. By contrast, the colors used by Chesebrough in relation to its VICL product, both before and after the 1989 relaunch, were the same ones used by the private label industry for twenty (20) years (i.e. yellow bottle with a blue and green label, sometimes accompanied by a yellow label field). Pet. 4-5; Venture Br. 4-7; Appendices A-C; Amendment p. 1 and Appendix G; Ansehl Br. Appendix B.

The Court in *Qualitex* discussed the application of the doctrine of "functionality" in relation to colors in common use for products in various industries (e.g. farm machinery in the color green; drug capsule colors; outboard boat motors in black). *Id.*, 63 U.S.L.W. at 4230. Perhaps, in relation to skin care lotion sold in a yellow bottle with label colors of blue and green, the *Qualitex* decision and its discussion of the functionality of certain colors more appropriately comes to the assistance of the Respondents than the Amici and Chesebrough.

Gerstman Br. 4 and 7-8. However, in *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033 (2d Cir. 1992), which came twelve (12) years after *Oral-B Labs.*, the Second Circuit did not recognize the alleged "presumption." *See* discussion, Pet. App. 19a-20a and Ansehl Br. 10-11.

4. The Federal Circuit Did Not Ascribe a Lesser Degree of Protection to Trade Dress.

The Amici contend, in various language all having the same meaning, that the present decision "fails to recognize trade dress as a form of intellectual property equal in legal and commercial importance to trademarks" AHP Br. 2; *see* also, INTA Br. 3; Gerstman Br. 5; and Bristol-Myers Br. 4. Each of these arguments attempts to rely upon this Court's decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*, __ U.S. __, 112 S.Ct. 2753, 120 L.Ed.2d 615, *reh'g denied*, __ U.S. __, 113 S.Ct. 20, 120 L.Ed.2d 947 (1992).

In *Two Pesos*, this Court held that a party asserting rights in a trade dress need not always prove secondary meaning in order to be entitled to protection. *Two Pesos* __ U.S.at __, 112 S.Ct. at 2747-2761. That was the ***only*** matter determined in the *Two Pesos* decision. *Id.* In fact, this Court was careful to note that the issue of whether the alleged trade dress was entitled to protection (i.e. was functional) was not before the Court. *Id.* __ U.S. at __, n.6, 112 S.Ct at 2757, n.6. There was also no discussion in *Two Pesos* of any of the infringement factors which weighed heavily in the decision of the Federal Circuit here. *see* Point 1, above.

The issue of whether Chesebrough's VICL trade dress is inherently distinctive was not before the Federal Circuit. What was before the Federal Circuit were several significant clear errors of commission and omission made by the trial court. Because *Two Pesos* was not apropos of the matters before the Federal Circuit (i.e. this case did not involved an issue of "inherent distinctiveness" verses "secondary meaning"), the Federal Circuit did not cite *Two Pesos*. This is far from the ominous portents propounded by the Amici. AHP Br. 3-5.

In relation to the allegation that the Federal Circuit treats trade dress infringement differently, and under a lower standard, than trademark infringement, the decision in this action and

others point to a contrary conclusion. The Federal Circuit has held that merely because a product is produced under a private label does ***not*** give it a special exemption from trade dress infringement. *Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 1202-1205 (Fed. Cir. 1994)(a case also arising from the Eighth Circuit).[5] *See, Payless Shoesource, Inc. v. Reebok Intern. Ltd.*, 998 F.2d 985, 988-90 (Fed. Cir. 1993).

In addition, the Federal Circuit applied the customary "likelihood of confusion" analysis to the present case. Pet. App. 10a-11a and 15a-23a. In summarizing its holding, the Federal Circuit noted that a violation of the Trademark Act could not be found "absent a showing by the plaintiff that real consumers have real confusion or likelihood of it with regard to the origin of the products involved." Pet. App. 22a. This is a simple restatement of the standard applied in all trademark and trade dress actions, whether or not a "private label" is involved. The Federal Circuit has not deviated from precedent to establish a "private label" exception.

Conclusion

For the reasons aforesaid and those set forth in the Venture Brief and Ansehl Brief, it is respectfully submitted that the motions of the various Amici for leave to file briefs in support of the Petitioner should be denied and that the Petition for Certiorari should also be denied.

---

[5] It should be noted that *Tone Bros.* was decided very shortly before the present case and that Judge Plager was on the panels of both the present case and *Tone Bros.*

Respectfully Submitted,

PAUL F. KILMER*
THOMAS W. BROOKE
GADSBY & HANNAH
1747 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 429-9600
Attorneys for Respondents The May Department Stores Company and Venture Stores, Inc.

Counsel of Record

the trade sales file, you indicated that you would be able to determine who was the first company sold to from your file. Can you please do so?

A. Can I have a moment to —

Mr. VOGL: Sure.

MR. BLOSSER: Off the record.

(Off the record)

A. It appears from the file that February 24th,1988, would be the earliest invoice.

Q. In your file?

A. Yes, in my file.

MR. BLOSSER: I'd like to have marked a file which has "Ansehl" at the top as Defendants' Exhibit 156.

(DEFENDANTS' DEPOSITION EXHIBIT NO. 156 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. BLOSSER:

Q. Mr. Wadhams, I've had marked for purposes of identification a file with an orange or yellow tab at the top with "Ansehl" typed on it as Defendants' Exhibit 156. Are you familiar with that file?

A. Yes, I am.

Q. Can you identify it?

A. This would be a file that was kept by Art Retsema.

Q. As the industrial sales manager for Chesebrough-Ponds?

A. Yes.

Q. During the time that he was is employed in that capacity?

A. Yes.

MR. BLOSSER: Peter, will you stipulate that this Defendants' Exhibit 156 and the contents are business records of Chesebrough-Ponds?

MR. VOGL: Yes, I will.

BY MR. BLOSSER:

Q. Could you please review very briefly some of the invoices in there and see if they might date back to 1985, as you testified you believed sales, in fact, did begin in your earlier testimony?

A. Okay. Here's a memo that I come to, October 30th, 1985, and a purchase order, October 24th, 1985.

Q. The purchase order is from who?

A. The Benjamin Ansehl Company.

Q. Based on that record, the business records reflect that sales commenced at least in 1985 then; correct?

A. Yes.

MR. BLOSSER: All right. I have another file. It has a tab at the top in white typed "Northwestern Bottle Company." I'll have that marked as Defendants' Exhibit 157 for purposes of identification.

(DEFENDANTS' DEPOSITION EXHIBIT NO. 157 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. BLOSSER:

Q. Mr. Wadhams, I had Defendants' Exhibit 157 marked, and I hand it to you and ask if you're familiar with that particular file?

A. Yes, I am.

Q. Can you identify it?

A. This is the additional file maintained by Retsema for trade sales that shows Northwestern Bottle Company invoices.

Q. This, again, would have been a file maintained by Art Retsema as industrial sales manager at Chesebrough-Ponds?

A. Yes.

MR. BLOSSER: Again, Peter, would you stipulate this is a business record and it contains business records?

MR. VOGL: Yes, I will.

BY MR. BLOSSER:

Q. Mr. Wadhams, who or what is the Northwestern Bottle Company?

A. To the best of my knowledge, it is a supplier of containers, bottles, caps, jars, plastic components, and —

Q. To your knowledge, they don't sell product in the bottles? They sell bottles to be used by other companies for selling product; is that correct?

A. To the best of my knowledge, it's empty containers.

Q. Do you know who any of their customers are?

A. No, I would not.

Q. Were VICL-brand-type bottles sold to Northwestern Bottle Company by Chesebrough-Ponds?

MR. VOGL: So the record is clear, which exhibit are you referring to?

MR. BLOSSER: Well, referring specifically to Defendants' Exhibits 155 and 21.

A. Again, I would need to refer to the file to see if —

BY MR. BLOSSER:

Q. Please do so, if you can find it there.

A. -- just to verify. Yes. 16-ounce tapered oval bottle, yellow in color.

Q. That, again, would have been made from the same mold that made the 16 ounce VICL brand bottle for sale by Chesebrough-Ponds; correct?

A. Can I have a moment?

MR. BLOSSER: Sure.

* * * *

Q. What was the name of it, again?

A. Evron Industries Limited.

MR. VOGL: Why don't you spell that for the reporter, please.

THE WITNESS: E-v-r-o-n Industries, Limited.

BY MR. BLOSSER:

Q. What's the date of that invoice?

A. This date is April 1, 1987.

Q. Do you have any information as to the nature of business of Evron Industries Limited?

A. No, I do not. That's the only additional one I see.

Q. What file are you looking at at the present time?

A. Exhibit 157, Northwestern Bottle Company file.

Q. Referring to Defendants' Exhibit 154, there is a factory invoice which appears to be No. 84852, and I ask you if that indicates an additional company?

A. Yes. This would be invoice to Northwestern Bottle and shipped to address of Trent Industries.

Q. Would that indicate that Trent Industries would be the ultimate receiver of the bottles?

A. Yes.

Q. For what reason would it be invoiced to Northwestern Bottles as opposed of Trent Industries?

A. The Northwestern Bottle, who actually purchased the containers and the location they would be shipped to would be specified by Northwestern Bottle.

Q. Would that indicate to you that Northwestern Bottle contracted with Trent Industries to purchase the bottles?

from Chesebrough for Trent Industries' use? Do you have any information about that?

A. I would not have information to that business arrangement. Going back to my earlier statement, Northwestern Bottle Company sells containers, caps of which this, I think, would be there.

MR. BLOSSER: Bear wit me a second here. Referring to Defendants' Exhibit 154, there's an interoffice memorandum which I'll have marked as 154A and I'd like you to take a look at.

(DEFENDANTS' DEPOSITION EXHIBIT NO. 154A WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. BLOSSER.

Q. Mr. Wadhams, referring to Defendants' Exhibit 154A, have you seen that interoffice memorandum before?

A. Yes. My name appears on the distribution.

Q. Okay. And you're familiar with it?

A. Yes.

Q. Can you identify it?

A. Yes. This would be the memo that discontinued our practice of selling excess machine capacity to outside customers.

Q. What's the date of that memo?

A. This is dated October 10th, 1988.

Q. The memo is from who and to whom?

A. The memo is from Art Retsema and it is to L. Barnes.

Q. Who is L. Barnes?

A. L. Barnes is a production manager of Chesebrough-Ponds.

Q. Were you involved in any discussions concerning the discontinuation of the sale of bottles to third parties?

A. Yes.

Q. What discussions can you recall to that effect?

A. I recall by memory our current conditions and excess capacity was diminishing and per this memo we needed to discontinue commitments to outside parties because we no longer would be able to supply machine time.

Q. There was a drop off in excess capacity to the point where it was not feasible to supply third parties; is that what you're saying?

A. I believe, to the best of my recollection, that's one of the reasons we were discontinuing the practice of selling outside of capacity.

Q. Was that the reason that was explained to the outside companies, do you know?

A. I don't know what was spelled out to the companies other than what was in this memo.

Q. Did you ever personally have any conversations with the companies that you previously identified, Benjamin Ansehl, Northwestern Bottle, concerning the termination of the supply arrangement with them?

A. No.

Q. Would that have been Mr. Retsema or somebody else?

A. Mr. Retsema would have done that—phone conversation or personal contact.

Q. Okay. In that memorandum which is Defendants' Exhibit 154A, there's a reference to a Team Packaging. Are you familiar with that company?

A. Yes, I am.

Q. And were they also a purchaser of the bottles similar to Defendants' Exhibit 155 and 21 that were being sold by Chesebrough-Ponds?

A. Yes.

Q. Do you recall over what period of time they would have been purchasing bottles from Chesebrough-Ponds?

A. To the best of my recollection, and based on this sheet, and their purchase order, October 3, 1988.

* * * *

Q. You haven't had any discussions with Mr. Retsema in preparation for your deposition today, have you?

A. No.

Q. Have you had any discussions with any other present or former Chesebrough-ponds employees in connection with today's deposition?

A. Yes.

Q. Who would that be?

A. It would be our personnel manager, Charlene Mullen, from the standpoint that we discuss any type of outside activities, legal affairs, so that our corporate legal affairs people can be informed.

Q. Did you have any discussions with present or former Chesebrough-ponds employees specifically about bottle sales to Benjamin Ansehl or other companies?

A. No.

MR. BLOSSER: let's have this marked as Defendants' Exhibit 154B.

(DEFENDANTS' DEPOSITION EXHIBIT NO. 154B WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. BLOSSER:

Q. Mr. Wadham's, I've had marked for purposes of identification a document, one-page document, as Defendants' Exhibit 154B and I'll ask you if you've ever seen that before.

A. Yes.

Q. Are you familiar with it?

A. Yes. This would be a factory invoice for bottle and cap shipment to Benjamin Ansehl Company on April 11th, 1988, which was shipped on April 28th, 1988.

Q. And this, in fact, is a carbon of an invoice that you personally signed?

A. Yes.

Q. There are a number of columns with headings on it. Bear with me a moment. I'll ask you what each of them represents. Beginning on the upper left-hand side it says, "requested by," and it has your name. I take it that just simply means that you're the one that requested this order to be filled internally?

A. I requested this document to be typed?

Q. I see. And then request, that's simply the date you requested the document be typed?

A. Correct.

Q. And then it says "approved by authorized signature", that would be similar?

A. That would be me.

Q. That would be you or somebody of the same authority who would have the ability to order this invoice to be sent out; is that correct?